Supreme Court, U. S.
FILED
NOV 5 1979
MICHAEL RODAK, JR., CLERK

No. 79-645

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROMA McKINNEY JUSTICE, GLEN JUSTICE, FRED McKINNEY, BETTY McKINNEY, MURREL McKINNEY, ALBERTA McKINNEY, ALVA McKINNEY QUINN, JANE McKINNEY, JAMES McKINNEY, GEORGINE McKINNEY, CHARLES McKINNEY and CINDY McKINNEY,

Petitioners,

v.

PENNZOIL COMPANY,

Respondent.

BRIEF OF RESPONDENT, PENNZOIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRED L. DAVIS, JR.
WILLIAM A. TRAINER
DAVIS, DAVIS, HALL & CLOVIS
Seventh Floor — Union Trust Building
Post Office Box 288
Parkersburg, West Virginia 26101

Counsel for Respondent

McGLOTHLIN PRINTING COMPANY PARKERSBURG, WEST VIRGINIA

INDEX

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 3

A. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH THE SUBSTANTIVE LAW OF THE STATE OF WEST VIRGINIA OR DECISIONS OF THIS COURT RELATING TO THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION .. 3

B. THE FOURTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CERTIFY A LONG-SETTLED PRINCIPLE OF STATE PROPERTY LAW TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA 6

C. THE FOURTH CIRCUIT CORRECTLY DETERMINED THE SUBSTANTIVE LAW OF WEST VIRGINIA IN CONNECTION WITH THE ALLEGED DAMAGES TO PETITIONERS' SURFACE 7

D. THE PETITIONERS, IN THIS PROPERTY DAMAGE ACTION PLEAD SOLELY IN NEGLIGENCE, HAVE NO STANDING TO ASSERT THAT RESPONDENT HAS BREACHED ANY COVENANTS OF A CONTRACTURAL NATURE, WHICH COVENANTS ARE CONTAINED IN THE OIL AND GAS LEASE 8

1. Petitioners did not plead a contractual cause of action in their complaint, which only alleged negligence 9

2. Petitioners did not offer to the trial court a proposed charge to the jury on any contractual issue 9

INDEX *(continued)*

3. The Fourth Circuit correctly determined and applied the substantive law of the State of West Virginia on this issue 10

CONCLUSION 14

APPENDIX 1a

CITATIONS

Cases

Page

Adams v. Dovison-Paxon Co., 230 S.C. 532, 96 S.E. 2d 566 (1957) 3

Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E. 2d 633 (1950) 3, 4, 5, 6, 7

Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) 3, 4

Cowan v. Fulton, 407 F. 2d 93 (4th Cir. 1969) 10

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 3, 4, 6, 7, 8

Florida ex rel Shevin v. Exxon Corp., 526 F. 2d 266 (5th Cir. 1976) 6

Gentry v. Louisville and N. R. Co., 371 F. 2d 829 (6th Cir. 1967) 10

Hurwthal v. St. Lawrence Boom & Lumber Co., 53 W. Va. 87, 44 S.E. 520 (1903) 12, 13

Ison v. Daniel Crisp Corp., 146 W. Va. 786, 122 S.E. 2d 553 (1961) 11

Johnson v. Junior Pocahontas Coal Co., Inc., 234 S.E. 2d 309 (W.Va. 1977) 5, 6

Mullins v. Beatrice Pocahontas Co., 432 F. 2d 314 (4th Cir. 1970) 5, 6

Ostapenko v. American Bridge Div. of U.S. Steel Corp., 267 F. 2d 204 (2nd Cir. 1959) 10

Tarr v. Manchester Ins. Corp., 544 F. 2d 14 (1st Cir. 1976) 6

Worden v. Courtemanche, 415 F. 2d 349 (2nd Cir. 1969) 10

CITATIONS (continued)

Page

Constitutional Provisions and Statutes

Fair Labor Standards Act, 29 U.S.C. §201-219 (1938) 8

United States Constitution, Seventh Amendment 1, 4

Uniform Certification of Questions of Law Act, West Virginia Code 51-1A 1

Rules

Federal Rules of Civil Procedure, Rule 51 ..... 9, 10

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-645

ROMA McKINNEY JUSTICE, ET AL,

Petitioners,

vs.

PENNZOIL COMPANY,

Respondent.

BRIEF OF RESPONDENT, PENNZOIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

1. Whether in this diversity action the decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the substantive law of the State of West Virginia or decisions of this Court relating to the Seventh Amendment to the United States Constitution?

2. Whether the United States Court of Appeals for the Fourth Circuit abused its discretion by refusing to certify a long-settled question of state property law to the Supreme Court of Appeals of West Virginia, pursuant to the Uniform Certification of Questions of Law Act, West Virginia Code 51-1A, as amended?

3. Whether the United States Court of Appeals for the Fourth Circuit correctly determined the substantive law of the State of West Virginia concerning the alleged damages to petitioners' surface?

4. Whether, in a property damage action plead solely in negligence, the petitioners have any standing to assert that respondent has breached any covenants of a contractual nature contained in the oil and gas lease?

STATEMENT OF THE CASE

A concise statement of the case, including the development of the case as well as the facts material to the consideration of the questions presented, is contained in the opinion of the United States Court of Appeals for the Fourth Circuit (P. App. 1a)[1].

The only material matter not set forth in the opinion below is that the petitioners' complaint, which sounded solely in negligence, did not allege a contractual cause of action (Res. App. A1). In the first paragraph of "STATEMENT" contained in their Petition for Writ of Certiorari, petitioners in fact acknowledge that their cause of action related to injuries to "their land" allegedly caused "by the careless and negligent drilling operations" of respondent (P. 3). The remaining portion of the petitioners' "STATEMENT" contains many erroneous factual allegations, misstatements of facts and self-serving conclusions totally unsupported by references to their Appendix or the record. Respondent makes no attempt to refute these inaccurate allegations, misstatements and conclusions since the material facts are correctly set forth in the opinion of the United States Court of Appeals for the Fourth Circuit (P. App. 1a).

---

[1] The Petition for Writ of Certiorari and the Appendix to the Petition will be referred to as "P. _____" and "P App. _____." The Appendix to the Brief for Respondent will be referred to as "Res. App. _____."

ARGUMENT

A. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH THE SUBSTANTIVE LAW OF THE STATE OF WEST VIRGINIA OR DECISIONS OF THIS COURT RELATING TO THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners contend that the decision by the Fourth Circuit is in conflict with this Court's opinion in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), and further that it incorrectly states the substantive law of West Virginia relating to the reasonable use of surface rights by the owner of the oil and gas underlying the surface. An examination of the controlling authority readily discloses that petitioners' argument is totally without merit.

Since the landmark decision of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that in diversity cases the substantive law of the local state is the controlling authority in tort actions of this nature. This principle was reaffirmed in *Byrd*, the very case on which petitioners rely in urging the reversal of the Fourth Circuit. In *Byrd*, this Court held:

> "It was decided in Erie R. Co. v. Tompkins that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in Adams v. Davison-Paxon Co. to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required." [citation omitted] 356 U.S. at 535.

The Fourt Circuit correctly determined that the rule of property law in West Virginia, as enunciated in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E. 2d 633 (1950), defines the rights and obligations of vested land interests and,

consequently under the *Erie* doctrine, was not in conflict with the considerations discussed by this Court in *Byrd*.

In *Adkins*, the Supreme Court of Appeals of West Virginia held that subsequent to the jury's resolution of all disputed facts, it was the duty of the trial court to determine whether the use of the surface by the operator of the oil and gas rights was a reasonable and necessary one. 134 W. Va. at 724, 61 S.E. 2d at 636. As the Fourth Circuit stated in its decision, *Adkins* is not in conflict with *Byrd* inasmuch as all disputed issues of fact are to be resolved by the jury and not by the Court. After the jury has resolved any disputed issues of fact through the use of special interrogatories, the Court would then determine whether the operator had reasonably and fairly used the surface for the enjoyment of its mineral estate under state property law pursuant to the various rights and obligations of the parties. In the event the trial court would determine that the oil and gas operator had unreasonably and unnecessarily used the surface, the jury would then assess damages pursuant to the Court's instruction. (P. App. 5a-6a).

It is clear that all disputed factual issues would be resolved by the jury through the use of special interrogatories under the *Adkins* doctrine. Then the trial court would be in a position to apply the state property law to the facts as found by the jury. Thus, this allocation of the court and jury functions is not a form or mode of procedure as was the case in *Byrd*. Rather, it is an integral part of the "state-created rights and obligations" of the parties as defined by the common law of West Virginia. *Byrd v. Blue Ridge Rural Elec. Coop.*, supra at 535. Consequently, the application of the *Adkins* decision in the instant case is not in conflict with the *Byrd* doctrine, and petitioners have not been denied their Seventh Amendment right to trial by jury.

Petitioners would have this Court believe that *Adkins* is not the controlling law of West Virginia relating to the reasonable and necessary use of the surface estate by an oil and gas operator. Rather, petitioners contend that two inapposite cases should be followed by this Court, namely, *Johnson v. Junior Pocahontas Coal Co., Inc.*, 234 S.E. 2d 309 (W. Va. 1977); *Mullins v. Beatrice Pocahontas Co.*, 432 F. 2d 314 (4th Cir. 1970). *Mullins* was an action for damages caused by a coal company in emitting coal dust from its processing plant. In that decision, the Fourth Circuit was called upon to interpret and construe Virginia substantive law, not the common law of West Virginia. The Fourth Circuit reversed the summary judgment granted by the District Court in favor of the defendant since under Virginia law there were genuine issues of material fact to be resolved by the jury.

Johnson was a civil action wherein the surface owners of land instituted suit against an independent contractor who had been hired to strip mine coal from adjacent property. The Circuit Court of McDowell County, West Virginia, granted the contractor's motion for summary judgment, which was appealed to the Supreme Court of Appeals of West Virginia. In reversing the lower Court, the West Virginia Court held that the contractor was not entitled to a summary judgment. In its opinion, the West Virginia Court only referred to the *Mullins* decision by way of *dicta* since that case was cited by the appellant-plaintiff.

Thus, it is patently clear that the *dicta* in *Johnson* and the interpretation of the Virginia common law in *Mullins* are not the law of this case. Conversely, this case is controlled by *Adkins* as properly applied by the Fourth Circuit. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

B. THE FOURTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CERTIFY A LONG-SETTLED PRINCIPLE OF STATE PROPERTY LAW TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

In support of its argument on the second question presented for review, petitioners argue that *Mullins* and *Johnson* are the "leading cases" relating to the reasonable use of the surface by an oil and gas operator. They further state that the action of the Fourth Circuit in applying *Adkins* rather than *Mullins* (which construes Virginia law), merits review by this Court. It is beyond comprehension that petitioners can urge this Court to apply Virginia law to the facts of this case in the face of West Virginia substantive law directly on point. The Supreme Court of Appeals of West Virginia has clearly articulated the applicable law in *Adkins*. The Fourth Circuit correctly determined that *Adkins* was the controlling authority, and then properly applied it. *Adkins* is clearly the prevailing common law in West Virginia. There is no conflict between *Adkins* and *Johnson*, which concerns strip mining and the attendant problem of the emission of coal dust. Therefore, there is no merit to petitioners' argument that this issue should be certified to the Supreme Court of Appeals of West Virginia.

It has been held by the Fifth Circuit that questions of state law ought not to be certified if the answer is reasonably clear. *Florida ex rel Shevin v. Exxon Corp.*, 526 F. 2d 266 (5th Cir. 1976). The only reason to certify a question is to ascertain what the state law is, and not, when the state has already articulated the law, to afford a party the opportunity to persuade the state court to change it. In *Tarr v. Manchester Ins. Corp.*, 544 F. 2d 14 (1st Cir. 1976), the First Circuit held that *Erie* requires any federal court sitting in diversity to apply state law when it is clearly enunciated. A federal court should not participate in an effort to change

state law through the certification process. Not only is the law reasonably clear in West Virginia, it is patently clear as articulated in *Adkins*. In applying *Adkins*, the Fourth Circuit did not make an *"Erie educated guess"* as to the prevailing state law. Rather than a conjectural conclusion, the Fourth Circuit's application of *Adkins* was based on long-settled precedent.

It should be noted that petitioners first raised the certification issue in their Petition for Rehearing filed after the Fourth Circuit rendered its opinion reversing the judgment entered by the District Court (Res. App. 4a). The certification issue was not raised in the District Court, nor in briefs or oral argument in the Fourth Circuit until after petitioners received the Fourth Circuit's adverse decision. Only then did they make their belatedly weak attempt to cloud this litigation by raising the certification issue, and citing nonauthoritative law in support of their position.

Thus, the Petition for Writ of Certiorari should be denied since it would be a useless act to certify a question to the Supreme Court of Appeals of West Virginia when there is no conflict in the law of West Virginia as applied by the Fourth Circuit. It is obvious that petitioners' only reason for asserting this issue at this late date is to be given the opportunity to persuade the West Virginia Court to change the prevailing substantive law of the state.

C. THE FOURTH CIRCUIT CORRECTLY DETERMINED THE SUBSTANTIVE LAW OF WEST VIRGINIA IN CONNECTION WITH THE ALLEGED DAMAGES TO PETITIONERS' SURFACE.

The third issue raised by petitioners in urging this Court to grant their Petition for Writ of Certiorari to the Fourth Circuit is that the Fourth Circuit should have applied federal or Virginia law rather than the applicable West Virginia law. Initially, it should be noted that petitioners in their

argument quote a portion of the opinion rendered by the Fourth Circuit out of context (P. 9, P. App. 6a). Nevertheless, the Fourth Circuit correctly held that: "There was almost no evidence, however, reasonably specifying the cost to repair the damage or the monetary devaluation of the land, as the district court struck most of the plaintiff's' expert witness testimony from the record." (P. App. 6a).

Once again, petitioners urge this Court to adopt the principle that federal law, as well as Virginia common law, should be dispositive of the issue of damages rather than the established common law of West Virginia. Petitioners' position is in direct conflict with and contradictory to *Erie*.

The Fourth Circuit correctly determined and then applied the prevailing West Virginia law on the issue of damages. The decisions of this Court cited by petitioners are obviously good authority in anti-trust litigation as well as cases arising under the Fair Labor Standards Act. These matters are clearly federal questions and properly determined by standards set forth in those opinions. Such is not the case in this diversity action applying West Virginia property law.

Respondent respectfully submits that this Court should deny the petitioners' Petition for Writ of Certiorari with respect to the third issue presented for review as this issue is totally void of any merit.

D. THE PETITIONERS, IN THIS PROPERTY DAMAGE ACTION PLEAD SOLELY IN NEGLIGENCE, HAVE NO STANDING TO ASSERT THAT RESPONDENT HAS BREACHED ANY COVENANTS OF A CONTRACTUAL NATURE, WHICH COVENANTS ARE CONTAINED IN THE OIL AND GAS LEASE.

Petitioners urge this Court to grant their Petition for Writ of Certiorari on the basis that there was "reversible error committed both by the District Court and the Circuit Court regarding an instruction to the jury on the application of

certain covenants in the lease under which respondent obtained their property rights." (P. 10, P. App. 14a).

Respondent respectfully submits that petitioners have no standing whatsoever to assert that it has breached any contractual covenants contained in the oil and gas lease for the following reasons:

1. Petitioners did not plead a contractual cause of action in their complaint, which only alleged negligence (Res. App. A1).

2. Petitioners did not offer to the trial court a proposed charge to the jury on any contractual issue (Res. App. 6a-8a).

3. The Fourth Circuit correctly determined and applied the substantive law of the State of West Virginia on this issue.

1. Petitioners did not plead a contractural cause of action in their complaint, which only alleged negligence.

Despite the fact that the petitioners failed to allege any breach of contract in their complaint, they presented testimony to the jury, over respondent's objections, concerning alleged violations of the lease provisions. At the conclusion of the evidence, the District Judge, in chambers, ruled that he would not instruct the jury on this issue (Res. App. 9a). However, he failed to instruct the jury to disregard the evidence improperly admitted in this regard, thereby prejudicing respondent. Respondent submits that since petitioners failed to allege a breach of contract, they should not be permitted to assert such a claim in this Court.

2. Petitioners did not offer to the trial court a proposed charge to the jury on any contractual issue.

Petitioners are precluded from asserting the alleged breach of contract since they failed to request an instruction on this issue by the Court as required by Rule 51 of the Federal Rules of Civil Procedure (Res. App. 10a). At the trial court

level, petitioners requested that only three instructions be given to the jury, none of which dealt with the fourth issue raised by the petitioners in their Petition for Writ of Certiorari (Res. App. 6a-8a). Although counsel for petitioners objected on the record to the Court's charge to the extent that it did not encompass petitioners' proffered instructions, this objection did not save any grounds for appeal due to the failure of petitioners to request any instructions on the alleged breach of contract (Res. App. 9a). It is hornbook law that a party cannot assign as error the failure of a court to instruct the jury on an issue when that same party makes no written request for such an instruction pursuant to Rule 51 of the Federal Rules of Civil Procedure. See *Cowan v. Fulton*, 407 F. 2d 93 (4th Cir. 1969); *Gentry v. Louisville and N. R. Co.*, 371 F. 2d 829 (6th Cir. 1967); *Ostapenko v. American Bridge Div. of U. S. Steel Corp.*, 267 F. 2d 204 (2nd Cir. 1959); *Worden v. Courtemanche*, 415 F. 2d 349 (2d Cir. 1969).

Therefore, petitioners cannot now complain of any error by the District Court in its failure to instruct the jury on this issue.

3. The Fourth Circuit correctly determined and applied the substantive law of the State of West Virginia on this issue.

In their Petition for Writ of Certiorari, petitioners quote the Fourth Circuit out of context in relation to the alleged violation of the terms of the lease (P. 10, P. App. 8a). This evidence was objected to by respondent on the grounds that it was irrelevant to this action since the lease provisions did not inure to the benefit of the petitioners. When one examines the rights and obligations of the parties to this litigation, the oil and gas lease of 1904 must be read together with the 1920 severance deed from A. E. Robertson to B. P. McKinney wherein the surface of the land was conveyed to petitioners' predecessors in title subject to the reservation of the oil and

gas and the right to operate the same by A. E. Robertson (Res. App. 11a).

The District Court and the Fourth Circuit correctly determined and applied the substantive law of West Virginia on this issue. Petitioners were not third party beneficiaries to the lease and no rights under the lease inured to their benefit. The Supreme Court of Appeals of West Virginia in *Ison vs. Daniel Crisp Corp.*, 146 W. Va. 786, 122 S. E. 2d 553 (1961), held that in the absence of a provision in a contract specifically stating that the contract will inure to the benefit of a third party, there is a strong presumption that parties did not so intend for the contract to benefit the third person. In order to overcome that presumption, the implication from the contract as a whole must be so strong as to practically amount to an express declaration. Thus a contract which is executed for the benefit of a third party must have the consent of all parties to the contract.

In setting forth the "relevant conditions" of the oil and gas lease in their Petition (P. 10-11), petitioners neglected to set forth the one convenant which expresses the intent of the parties, namely:

> "The Lessors shall have gas for the dwelling from any gas well on said premises free by making connections." (P. App. 15a)

In the severance deed, A. E. Robertson reserved the oil and gas and the right to operate the same. However, in that same reservation the free gas for domestic use was conveyed to B. P. McKinney (Res. App. 12a). Since A. E. Robertson expressly declared that the free gas covenant was to be for the benefit of B. P. McKinney, the converse would apply with respect to the remaining covenants in the oil and gas lease and they would not inure to the benefit of the petitioners.

When the rationale of *Ison* is applied to the Robertson oil

and gas lease and the 1920 severance deed, it is readily apparent that the covenants of the lease were not meant to inure to the benefit of petitioners. Further, had respondent executed a new lease containing no provisions similar to those in the 1904 lease, petitioners would have no cause of action.

Before a covenant is a real covenant which runs with the land, there must be privity of estate between the parties. *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W. Va. 87, 44 S.E. 520 (1903).

In *Hurxthal*, plaintiff's predecessor in title was owner of a flour and grist mill which was located on Greenbrier River. Defendant who owned a saw mill also located on the river, entered into an agreement with plaintiff's predecessor in title whereby defendant agreed to maintain two dams on the river, and to prevent the accumulation of trash in the mill race. Plaintiff, successor in title to the individual who entered into the agreement with defendant, instituted an action based on breach of covenant alleging that defendant failed to maintain the dams. An issue before the court was whether the covenants were real covenants running with the land, or merely covenants personal to the individual who executed the agreement with defendant. The Supreme Court of Appeals of West Virginia held:

> "It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee." 53 W. Va. at 92, 44 S.E. at 522.

The West Virginia Court went on to hold that the covenant contained in the agreement was a personal covenant since the defendant conveyed no interest in the mill, but made a personal obligation which affected the mill. The covenant

lacked the one essential element, namely, privity of estate, which would have made it a real covenant running with the land. Consequently, it did not inure to the benefit of the plaintiff. There was a provision in the agreement which gave the assignees of Ben Hurxthal the right to continue the agreement for an additional five years. By reason of this provision, the West Virginia Court went on to hold that plantiff could maintain a suit for any breach of covenant which occurred during the five years she owned the property, since she had continued the agreement.

In the instant case, the covenants in the oil and gas lease obviously affect the surface of the land. As in *Hurxthal*, there was no interest in the surface conveyed by the 1904 lease. The lessee merely made a personal convenant. Since privity of estate is lacking between the parties to this litigation, the covenants contained in the 1904 lease did not run with the land and do not inure to the benefit of petitioners.

With the exception of *Hurxthal*, the West Virginia cases cited by petitioners are not relevant to this issue. Since there is established West Virginia law supporting respondent's position, petitioners' citations to authority of other states are without merit. Both the District Court and the Fourth Circuit were correct in their application of the common law of West Virginia to this issue. Therefore, the petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully urges this Court to deny the petitioners' Petition for Writ of Certiorari for reason that the opinion of the Fourth Circuit correctly states the substantive law of the State of West Virginia on each question presented for review and for further reason that the Fourth Circuit's opinion is not in conflict with any decision of this Court.

Respectfully submitted:
FRED L. DAVIS, JR.
WILLIAM A. TRAINER
Post Office Box 288
7th Floor Union Trust Building
Parkersburg, West Virginia 26101

DAVIS, DAVIS, HALL & CLOVIS
ATTORNEYS AT LAW
Parkersburg, West Virginia
Of Counsel

No. 79-645

In the
Supreme Court of the United States

OCTOBER TERM, 1979

ROMA McKINNEY JUSTICE, GLEN JUSTICE, FRED McKINNEY, BETTY McKINNEY, MURREL McKINNEY, ALBERTA McKINNEY, ALVA McKINNEY QUINN, JANE McKINNEY, JAMES McKINNEY, GEORGINE McKINNEY, CHARLES McKINNEY and CINDY McKINNEY

Petitioners,

v.

PENNZOIL COMPANY,

Respondent.

APPENDIX
TO
BRIEF OF RESPONDENT, PENNZOIL COMPANY,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRED L. DAVIS, JR.
WILLIAM A. TRAINER
DAVIS, DAVIS, HALL & CLOVIS
Post Office Box 288
Seventh Floor — Union Trust Building
Parkersburg, West Virginia 26101

Counsel for Respondent

INDEX TO APPENDIX

	Page
1. COMPLAINT	1a
2. PETITION FOR REHEARING BEFORE THE FOURTH CIRCUIT	4a
3. "JURY CHARGE" PROPOSED BY PETITIONERS	6a
4. EXCERPT FROM TRIAL RECORD—DISCUSSION BY COURT AND COUNSEL IN THE COURT'S CHAMBERS CONCERNING PROPOSED INSTRUCTIONS REQUESTED BY PETITIONERS	7a
5. EXCERPT FROM TRIAL RECORD — RULING BY THE DISTRICT COURT AT CONCLUSION OF EVIDENCE RELATING TO BREACH OF CONTRACT ISSUE	9a
6. RULE 51, FEDERAL RULES OF CIVIL PROCEDURE	10a
7. SEVERANCE DEED FROM A. E. ROBERTSON TO B. P. McKINNEY	11a

IN THE
CIRCUIT COURT OF LINCOLN COUNTY,
WEST VIRGINIA

ROMA McKINNEY, FRED McKINNEY,
MURREL McKINNEY, ALVA McKINNEY,
JANE McKINNEY, and JAMES McKINNEY,
Plaintiffs

vs CIVIL ACTION NO. 2644

PENNZOIL COMPANY,
Defendant

COMPLAINT:

I.

That the plaintiffs are residents of Kanawha and Lincoln County, West Virginia; that the defendant is and was at all times hereinafter stated, a corporation, organized and existing under the laws of the State of West Virginia, doing business in Lincoln County, West Virginia, and that this Court has jurisdiction of this cause.

II.

That plaintiffs were at the times hereinafter stated the owners and in possession of the following described real estate, situate in Lincoln County, to-wit:

> All that certain tract of land situate in Duval District, Lincoln County, State of West Virginia, on the waters of Joes Creek of Trace Fork of Mud River bounded substantially as follows:
>
> On the north by lands of Sarah Alford; on the east by lands of Morris Dunlap; on the south by lands of Nonay McCoy; on the west by lands of J. W. Lipscomb, containing 96 acres, more or less, reserving, however, therefrom 300 feet around the buildings on which no well shall be drilled by either party except by mutual consent.

III.

That the defendant owns and operates an oil and gas lease on the above described land and in developing said lease has drilled numerous wells on said premises on which it is producing a quantity of oil and a large amount of salt water, sediments, and other poisonous and deleterious substances, which have been permitted to excape and flow on and across the surface of said land into small streams and into the low places causing the damage hereinafter set out.

IV.

That the defendant permitted salt water to excape from a pit located on the up-land and flow down and across plaintiffs land, completely destroying the fertility of the soil.

V.

That the defendant by the use of a bulldozer build roads over the bottom land, elevated the roads by taking dirt from either side thereof, thus preventing the water from flowing off of the premises, and collecting the water on the premises in the low places where the soil has been taken out for the purpose of building roads and as a result a large portion of the plantiffs farm has been rendered useless and valueless for farming or cultivation; that all of the soil in the bottom-land which has not been destroyed by salt water, as hereinafter set out, has been made valueless by reason of said operation of the defendant.

VI.

That the damage above referred to was caused by the negligence of the defendant in operating the leases, in permitting salt water to excape and flow on or across the premises as set out and in building roads and highways across the premises as set out, and by reason of said negligent acts, the value of the surface of plaintiffs' farm has been depreciated in the sum of $50,000.00.

VII.

Plaintiffs further allege that said acts on the part of the defendant as hereinabove set forth was done maliciously and wilfully.

WHEREFORE, premises considered, plaintiffs pray judgment against the defendant, in the sum of $50,000.00 as compensatory damages and in the sum of $50,000.00 as punitive damages and the costs of this action.

Roma McKinney, Fred McKinney,
Murrel McKinney, Alva McKinney,
Jane McKinney, and James McKinney
By Counsel

/s/ W. Jack Stevens
W. JACK STEVENS AND JAMES E. KESSINGER,
Attorneys for the Plaintiffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1151

ROMA McKINNEY JUSTICE, GLEN JUSTICE, FRED McKINNEY, BETTY McKINNEY, MURREL McKINNEY, ALBERT McKINNEY, ALVA McKINNEY QUINN, JANE McKINNEY, JAMES McKINNEY, GEORGIA McKINNEY, CHARLES McKINNEY, and CINDY McKINNEY,

Appellees,

v.

PENNZOIL COMPANY,

Appellant,

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

PETITION FOR REHEARING BY APPELLEES

QUESTIONS PRESENTED

1. Whether this Court in its decision of May 21, 1979, was correct in ruling that the District Court, sitting as a diversity court in West Virginia in this case, was bound by the West Virginia rule of *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E. 2d 633 (1950); and whether appellee-surface owners' constitutional rights, under the Seventh Amendment of the United States Constitution, were violated?

2. Whether the Court, in its decision of May 21, 1979, correctly ruled that appellees-surface owners have no standing to assert any lease covenants other than the "free gas" clause?

3. Whether this Court should certify the question of reasonable necessity and the question of appellees' standing to assert violations of certain lease covenants to the Supreme Court of Appeals of West Virginia under the Uniform Certification of Questions of Law Act, W. Va. Code, § 51-1A-1, *et seq.*?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

ROMA McKINNEY; FRED McKINNEY;
MURREL McKINNEY; ALVA McKINNEY
JANE McKINNEY and JAMES McKINNEY,

Plaintiffs,

vs. CIVIL ACTION NO. 75-0083-H

PENNZOIL COMPANY,

Defendant.

JURY CHARGE

1. If you find defendant drilled for oil by methods not permitted by lease, then you must find defendant liable for any and all damage resulting from such methods.

2. If you find defendant used the surface in such manner as was not fairly necessary for the extraction of oil, then you must find defendant liable for any and all damage resulting from such surface use.

3. If you find plaintiff's home is not on the 96 acre tract known as the A. E. Robertson tract, and you find that defendant's wells on the Robertson tract unreasonably interfered with plaintiff's use and enjoyment of their home, then you must find defendant liable to plaintiffs for defendant's interference with plaintiff's use and enjoyment of their home.

/s/ Neil K. Cohen

Neil K. Cohen
Kaufman & Ratliff
Counsel for Plaintiffs

EXCERPT FROM TRIAL RECORD — DISCUSSION BY COURT AND COUNSEL IN THE COURT'S CHAMBERS CONCERNING PROPOSED INSTRUCTIONS REQUESTED BY PETITIONERS

THE COURT: All right.

The question here of the amendment of the complaint at this late date is likewise one that the Court has to deny.

I have a proposed jury charge from the plaintiff in this case which defined the issues from the plaintiffs' standpoint — "And we would propose that one, two, three — in a document submitted to the Court in about the last week and a half, and I assume that these were the issues that the plaintiffs were going forward with when they came to trial. Is that not correct, Mr. Cohen?

MR. COHEN: I can't find my copy. I thought I put "nuisance" as one of the jury instructions — when I submitted, around August 20th, when I submitted my portion of the pre-trial order to the defendants, I think I put "nuisance" in as one of my instructions.

But so far as that goes, the facts on this which we are basing our claim of nuisance is exactly the same facts that constitute unreasonable use. So there can't be any prejudice to the defendants in allowing us to show that they dumped dirt and uncovered rocks and timber over the hillside from Well No. 5. They knew we were going to bring that up to support our unreasonable use claim.

And we are also arguing that constitutes nuisance. The facts are the same. There cannot be any harm to them.

THE COURT: Except you have a new legal issue in that case that wasn't in the case previously.

MR. COHEN: Well, it was in the case of August 22nd.

MR. TRAINER: No, not by the jury charge that you submitted to our office. You had three — one, two, three. That

was it. Would you like to take a look at it? You are welcome to it.

MR. COHEN: All right.

If you find the defendant's wells on the Robinson tract unreasonably interfered with plaintiffs' use and enjoyment of their home, then you must find the defendant liable for payment for defendant's interference with plaintiffs' enjoyment — nuisance is unreasonable interference with use and enjoyment of your property. Instead of using the term I used the definition. But if the defendants don't recognize the definition of nuisance then I don't think because of their ignorance they're entitled to keep it out.

MR. DAVIS: We recognize the allegations contained in the complaint, Mr. Cohen.

MR. TRAINER: You had one chance to amend the complaint by adding additional parties.

MR. COHEN: We did even after we submitted that to you.

MR. DAVIS: You made no attempt to amend the complaint with respect to the allegation of nuisance or damages to the home or anything of that nature.

MR. KAUFMAN: We feel the substance of that charge has made clear to the defense long before now, your Honor, and we ask leave to go forward and prove these facts.

MR. DAVIS: I am not clear about one thing. Where are we insofar as the house is concerned — just wait and see what comes out in the evidence?

EXCERPT FROM TRIAL RECORD — RULING BY THE DISTRICT COURT AT CONCLUSION OF EVIDENCE RELATING TO BREACH OF CONTRACT ISSUE.

THE COURT: Well, I am going to deny your motion for a directed verdict, and I'm going to submit the case to the jury on the question of whether or not there was negligence in the operation of the surface in relation to the drilling and production; and, secondly, whether or not there was an unreasonable use of the land in relation to the authorized drilling operations.

I am not going to instruct on punitive damages because the evidence does not support it.

And, secondly, I am not going to instruct on the breach of the provisions of the lease. I had given an indication to the contrary at the close of the plaintiffs' evidence, but I have reconsidered on this. And I find that there is no privity of the state here, nor is there any privity of the contract which would allow breach of the provisions of the lease to be asserted.

And I will go forward and tell you what I will instruct on.

MR. KAUFMAN: May we have a few moments to discuss that point, your Honor?

(Discussion off the record.)

MR. KAUFMAN: Let the record show our objection to that ruling.

THE COURT: All right.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SEVERANCE DEED
FROM A. E. ROBERTSON TO B. P. McKINNEY

THIS DEED, Made this 4th day of June, 1920, between A. E. Robertson, of the County of Lincoln, and State of W. Va., of the first part, and B. P. McKinney, of the aforesaid Co. and State, of the second part.

WITNESSETH: That the said part... of the first part, for and in consideration of Eighteen Hundred Dollars, ($1800.00) of which the same of Six Hundred Dollars is in hand paid, the receipt whereof is hereby acknowledged, and the residue to be in two notes of Six Hundred Dollars each, with int. at 6%, bearing even date herewith, said notes to be in six and twelve months. DO GRANT unto the party of the second part the following described tract or parcel of land, all of the certain tract of land, lying and being on Joes Creek of Trace Fork on Mud River, in Lincoln County, West Virginia, and in Duval District, and described as follows:

BEGINNING on a beech 4½ poles east .. a [a] creek in a line of a survey of 732 acres, made for Jas. Black, thence north 68½ W. crossing the creek up a branch 40 poles to a stake in the branch, thence up a point, N. 36 W. 36 poles to two oaks, thence N. 48 W. 41 poles to W. oak on north side of ridge, thence S. 15 W 3 poles to a black oak on a knob, thence N. 78 W. 33 poles [a] W. Oak on a N. ridge, a point ridge, thence S. 60 W. 40 poles to a W. oak, thence N. 15 E. 33 poles to a W. oak on the W. side of a point ridge, corner to Bob Alford land, to with same, N. 68½ E. 61 P. to a dogwood, thence S. 88 E. 24 P. to a beech and maple about 7 P. south of a branch, corner to a survey of 732 acres, made for Black & Ballard, thence with the same N. 87½ E. 71 P. to a W. oak on south side near top, thence S. 36 E. (V. 2½) 73 P. to a stake on N. bank of the creek in a line of a survey of 100 acres, mad[ ] for John Chandler, thence with said 100 acres, S. 35 W. (V. 2½) 10½ P. to a stake 10 ft. S. E. of a small

walnut and at the place of two beeches, thence S. 2½ E. (V. 2½) 19½ P. to a stake 1 P. north of the creek, thence with the 732 acres, S. 47 W. (V. 2½) to a stake in S. edge of creek at the call of sugar and beech, thence S. 11 W. (V. 2½) 15½ poles to the beginning, containing 94 acres, more or less, the parties of the first part do hereby reserve the oil & gas[s] and right to operate [saine] excep gas[s] for domestic use, as is set forth in lease.

And the said party of the first part does hereby covenant with the party of the second part, that they will warrant generally the property hereby conveyed and do hereby reserve a lien upon the same for the unpaid purchase money.

WITNESS the following signature and seal:

his
A. E. X Robertson, (SEAL)
mark

WITNESS:
Alex Goode.

$2.00 U.S.I.R. Stamps
here cancelled.

STATE OF WEST VIRGINIA,
COUNTY OF LINCOLN, TO WIT:

I, O. L. Watts, a Notary Public of the County of Lincoln, DO CERTIFY that A. E. Robertson, whose name is signed to the writing above, bearing date the 4 day of June, 1920, has this day acknowledged the same before me in my said county.

Given under my hand this 4 day of June, 1920.

O. L. Watts, Notary Public.

My com. expires Aug. 24, 1926.

July 8, 1920.

LINCOLN COUNTY COURT CLERK'S OFFICE,

This Deed was this day presented to me in my office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste: /s/ A. F. Black Clerk
By /s/ E. J. Elkins Deputy.

CERTIFICATE OF SERVICE

I, Fred L. Davis, Jr., attorney for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Respondent Pennzoil Company in Opposition to Petition for Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit and Appendix upon the Petitioners by mailing three true copies thereof to their attorneys, Paul J. Kaufman, Ray E. Ratliff, Jr., Kaufman and Ratliff, at 701 Boulevard Tower, 1018 Kanawha Boulevard, East, Charleston, West Virginia 25301, on this 2nd day of November, 1979, by United States Mail, postage prepaid.

FRED L. DAVIS, JR.